Document Number Case Number Page 1 of 17 04-C-0973-C

United States District Court Western District of Wisconsin Theresa M. Owens

Filed/Received 04/04/2005 01:59:10 PM CDT

### IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

HEALTHCARE FACILITIES	)	
CONSULTING, INC. d/b/a ESC,	)	
Plaintiff,	)	CASE NO. 04 C 0973 C
V.	)	JUDGE CRABB
SE & ASSOCIATES, INC., SUNDIAL SOFTWARE CORP.,	) ) )	MAGISTRATE JUDGE CROCKER
JOSEPH SKALECKI, STEPHEN ELLIS,	)	FIRST AMENDED COMPLAINT FOR COPYRIGHT INFRINGEMENT
Defendants.	)	

Pursuant to Fed. R. Civ. P. 15 and the Court's Preliminary Pretrial Conference Order (setting April 4, 2005 as deadline to amend pleadings), Plaintiff, Healthcare Facilities Consulting, Inc. d/b/a ESC, for its First Amended Complaint against Defendants SE & Associates, Inc., Sundial Software Corporation, Joseph Skalecki, and Stephen Ellis alleges and states as follows:

#### **PARTIES**

- 1. Plaintiff, Healthcare Facilities Consulting, Inc. d/b/a ESC (hereafter "ESC"), is a Nevada corporation having a principal place of business at 2875 F Northtowne Lane, Suite 234, Reno, Nevada 89512.
  - 2. Defendant, SE & Associates, Inc. ("SE&A"), is a corporation having a place of

business at 3420 Amhurst Road, Janesville, Wisconsin 53556-8834.

- 3. Defendant, Sundial Software Corporation ("Sundial"), is a corporation having a place of business at 5325 Wall Street, Suite 2900, Madison, Wisconsin 53718.
- 4. Defendant, Joseph Skalecki ("Skalecki"), is an individual employed by SE&A and having a place of business at 3420 Amhurst Road, Janesville, Wisconsin 53556-8834.
- 5. Defendant, Stephen Ellis ("Ellis"), is an individual employed by SE&A and having a place of business at 3370 Howard Road, Murfreesboro, Tennessee 3127-6940.

#### JURISDICTION AND VENUE

- 6. This is a civil action for copyright infringement pursuant to 17 U.S.C. § 101, et. seq.
- 7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 and 1338.
- 8. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and 1400(a).

#### BACKGROUND FACTS

- 9. Since 1986 ESC has helped solve facility management problems using software and consulting tools it developed specifically for the cleaning industry. In 1996, ESC developed a computer program called *ESCt Environmental Service Computer Tools*® or *ESCt*.
- 10. Between 1996 and 2003, ESC developed several derivative versions of the *ESCt* software. Today these consist of versions 7.0, 7.6, 8.0, and 8.5.
- 11. In accordance with federal law, ESC has registered and owns copyrights covering the original *ESCt* software and three derivative versions of the software.

- 12. Copyright Registrations TX 6-095-278, TX 6-079-803, TX 6-061-497, and TX 6-095-279 for *ESCt* Versions 7.0, 7.6, 8.0, and 8.5 respectively are attached as Exhibit A.
- 13. On information and belief, Defendants SE&A, Sundial, Skalecki, and Ellis have had access to at least *ESCt* Versions 7.0, 7.6, and 8.0. Skalecki and Ellis are both former employees of ESC and were both subsequently independent sales representatives for ESC.
- 14. As independent sales representatives, Skalecki and Ellis sold the *ESCt* software and provided technical assistance to ESC's customers. As employees of or independent contractors for ESC, Skalecki and Ellis had access to *ESCt* Versions 7.0, 7.6, and 8.0.
- 15. On information and belief, Skalecki and Ellis formed SE & Associates, Inc. in 2003 to provide web-based housekeeping management products.
- 16. On information and belief, SE&A released a web-based software product called *Digital Housekeeper* that assists healthcare providers to manage their housekeeping departments.
- 17. On information and belief, SE&A, Skalecki, and/or Ellis commissioned a third party software developer to create the *Digital Housekeeper* software. SE&A, Skalecki, and/or Ellis had access to at least *ESCt* Version 8.0.
- 18. On information and belief, SE&A, Skalecki, and Ellis copied *ESCt Environmental Service Computer Tools* Version 8.0 (and possibly other versions) to create the *Digital Housekeeper* software.
- 19. On information and belief, SE&A, Skalecki, and/or Ellis terminated the first third party software developer's employment before the *Digital Housekeeper* software was completed.
  - 20. On information and belief, SE&A, Skalecki, and/or Ellis subsequently commissioned

Sundial, a software development company, to assist with the completion of the *Digital Housekeeper* software.

- 21. On information and belief, SE&A, Skalecki, Ellis, and Sundial had access to and copied *ESCt Environmental Service Computer Tools* Version 8.0 to create the *Digital Housekeeper* software.
- 22. SE&A, Skalecki, and Ellis are currently marketing and selling the infringing *Digital Housekeeper* software to many of ESC's long time customers.

#### COUNT I: COPYRIGHT INFRINGEMENT

- 23. ESC incorporates by reference Paragraphs 1 through 22 as if fully rewritten.
- 24. The *ESCt* software contains a substantial amount of wholly original material, which is copyrightable subject matter pursuant to 17 U.S.C. § 101, *et seq*.
- 25. ESC complied with the Copyright Act and secured the exclusive rights in and to the copyrights of the *ESCt* software, and received Certificates of Registration TX 6-095-278, TX 6-079-903, TX 6-061-497, and TX 6-095-279.
- 26. ESC is the owner of all right, title, and interest in and to the copyrights in the *ESCt* software.
  - 27. Defendants' acts of copying the *ESCt* software were and are unauthorized by ESC.
- 28. Defendants' *Digital Housekeeper* software is substantially copied from the *ESCt* software, and constitutes an infringement of ESC's copyrights by reproducing the copyrighted works, preparing one or more derivative works based upon the copyrighted works, and distributing copies of

the copyrighted works.

29. On information and belief, unless enjoined by this Court, Defendants intend to continue infringing upon and otherwise profiting from their infringement of the *ESCt* software.

30. Defendants' conduct has caused and will continue to cause irreparable injury to ESC's business, reputation, and goodwill unless restrained by this Court. ESC has no adequate remedy at law.

WHEREFORE, ESC requests that the Court enter judgment it its favor on its complaint and that the Court:

- A. Find that Defendants have infringed ESC's copyrights in the ESCt software;
- B. Find a substantial likelihood that Defendants will continue to infringe ESC's copyrights in the *ESCt* software unless enjoined;
- C. Order a preliminary and permanent injunction enjoining the Defendants and related parties from directly or indirectly infringing ESC's copyrights in the *ESCt* software, or continuing to market, offer, sell, dispose of, license, lease, transfer, display, advertise, reproduce, develop, or manufacture any works derived or copied from the *ESCt* software or to participate or assist in any such activity;
- D. Order Defendants and related parties to return to ESC any and all originals, copies, facsimiles, or duplications of the *ESCt* software in their possession, custody, or control;
- E. Order Defendants and related parties to return to ESC any and all originals, copies, facsimiles, or duplications of any work shown to infringe any copyright in the *ESCt* software;

- F. Order Defendants to deliver upon oath, to be impounded during the pendency of this action and destroyed pursuant to judgment herein, all originals, copies, facsimiles, or duplicates of any work shown to infringe any copyright in the *ESCt* software, including without limitation, all means of making such infringements, including all computers, computer networks, software, and electronic storage media;
- G. Order Defendants to file with the Court and to serve on ESC, within 30 days after service of the Court's order, a report in writing under oath setting forth in detail the manner and form in which Defendants have complied with the Court's order:
- H. Enter judgment for ESC and against Defendants for ESC's actual damages, and for any profits attributable to infringements of ESC's copyrights, and such other damages as the Court shall deem proper under the copyright statutes;
- I. Require Defendants to account for all gains, profits, and advantages derived from its acts of infringement and for its other violations of law;
- J. Order that all gains, profits, and advantages derived by Defendants from its acts of infringement and other violations of law be deemed to be held in constructive trust for the benefit of ESC;
  - K. Enter judgment against Defendants for ESC's costs and attorneys' fees;
- L. Find that the Defendants' acts of copyright infringement have been intentional and willful;
- M. Award ESC prejudgment interest on the amount of all its damages and attorneys' fees; and

N. Grant ESC such other and further relief, at law or equity, to which ESC may be entitled.

#### JURY DEMAND

Plaintiff, Healthcare Facilities Consulting, Inc. d/b/a ESC, herein demands a jury trial pursuant to Federal Rule of Civil Procedure 38 as to all issues so triable in this action.

Respectfully submitted,

HAHN LOESER & PARKS LLP

R. Eric Gaum (Ohio Reg. No. 0066573)

Admitted *Pro Hac Vice* regaum@hahnlaw.com

Robert J. Diaz (Wisconsin Reg. No. 1021458)

rjdiaz@hahnlaw.com

One GOJO Plaza, Suite 300 Akron, Ohio 44311-1076 (330) 864-5550 voice (330) 864-7986 fax

Attorneys for Plaintiff Healthcare Facilities Consulting, Inc. d/b/a ESC 

#### **CERTIFICATE OF SERVICE**

I hereby certify that on April 4, 2005, a copy of the foregoing FIRST AMENDED COMPLAINT FOR COPYRIGHT INFRINGEMENT is being served on the following counsel of record by E-mail and First Class mail, postage prepaid:

Stephen C. Werner, Jr., Esq. Roethe, Krohn, Pope LLP 321 E. Milwaukee Street Janesville, WI 53545 Attorney for Defendant SE & Associates, Inc.

Edward A. Corcoran, Esq. Brennan, Steil & Basting, S.C. 22 East Mifflin Street, Suite 400 P.O. Box 990 Madison, Wisconsin 53701 Attorney for Defendant Sundial Software Corp.

> One of the Attorneys for Plaintiff Healthcare Facilities Consulting, Inc. d/b/a ESC

### **EXHIBIT A**

# Certificate of Registration Case: 3:94-cv-00973-bbc Document #: 24 Filed: 04/04/05 Page 10 of 17



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

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TX 6-095-278



EFFECTIVE DATE OF REGISTRATION

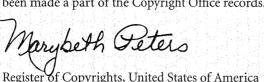
Register of Copyrights, United States of America DO NOT WRITE ABOVE THIS LINE IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET TITLE OF THIS WORK ▼ ENVIRONMENTAL SERVICE COMPUTER TOOLS 7 0 PREVIOUS OR ALTERNATIVE TITLES ▼ PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, senal, or collection, give information about the collective work in which the contribution appeared Title of Collective Work ▼ On Pages ♥ If published in a periodical or serial give Volume ▼ Number ▼ Issue Date ¥ NAME OF AUTHOR ▼ DATES OF BIRTH AND DEATH Year Born ▼ Year Died V HEALTHCARE FACILITIES CONSULTING, INC **AUTHOR'S NATIONALITY OR DOMICILE** WAS THIS AUTHOR'S CONTRIBUTION TO Was this contribution to the work a work made for hire"? THE WORK If the enswer to either of these questions is Citizen of **I** Yes ☐ Yes **IV** No Anonymous? "Yes " see detailed Nevada Corporation Instructions ☐ Yes PNo Pseudonymous? NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed NOTE Computer Program Under the law NAME OF AUTHOR ▼ DATES OF BIRTH AND DEATH the "author of Year Born ▼ Year Died V a "work made for hire" is generally the WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK If the answer to eith **AUTHOR'S NATIONALITY OR DOMICILE** employer not the employee Was this contribution to the work a If the answer to either work made for hire"? (see instruc of these questions is "Yes" see detailed ☐ Yes Citizen of Anonymous? ☐ Yes ☐ No tions) For any part of this Domiciled in Instructions Pseudonymous? ☐ Yes ☐ No work that was NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed made for hire check "Yes" in the space provided give NAME OF AUTHOR ▼ DATES OF BIRTH AND DEATH the employer Year Born ▼ Year Died V (or other person for AUTHOR'S NATIONALITY OR DOMICILE whom the work WAS THIS AUTHOR'S CONTRIBUTION TO Was this contribution to the work a was prepared)
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### Certificate of Registrations-bbc Document #: 24 Filed: 04/04/05 Page 12 of 17



This Certificate issued under the seal of the Copyright Office in accordance with title 17, United States Code, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.





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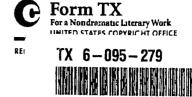
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